# SUPREME COURT OF THE UNITED STATES.

## No. 351.

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CHARLES COOPER, GEORGE ROGERS, C. GRAY COOPER, J. C. DEBIS, AND FRANK L. FAIRCHILD, PLAINTIFFS IN ERROR,

vs.

CHARLES E. COATES, GEORGE W. P. COATES, AND J. PENNOCK COATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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3 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said district, sitting in said circuit court, on Tuesday, the twenty-fifth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth year.

WILLIAM H. BRADLEY,
*Clerk.*

CHARLES E. COATES, GEORGE W. COATES, AND J. Pennock Coates,
*vs.*
CHARLES COOPER, GEORGE ROGERS, C. GRAY Cooper, Julius C. Debis, and Frank L. Fairchild. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fifteenth day January, in the year of our Lord one thousand eight hundred and seventy-two, in the December term, A. D. 1871, of the circuit court of the United States, in the record of the proceedings thereof appears the following entry, to wit:

*Leave to supply destroyed files.*

CHARLES E. COATES, GEORGE W. COATES, AND J. Pennock Coates,
*vs.*
CHARLES COOPER, GEORGE ROGERS, C. GRAY Cooper, and Julius C. Debis. } Assumpsit.

4 On motion of the plaintiffs by Hutchinson & Luff, their attorneys, and as per stipulation filed, leave is given the plaintiffs to file a copy of the declaration and plea heretofore filed herein and destroyed by fire on the ninth day of October last, and it is ordered that they be substituted for and stand in the place of the said original declaration and plea.

On this day, to wit, the fifteenth day of January, A. D. 1872, came said plaintiffs by their attorneys and filed with the clerk of said court their bond for costs in said entitled cause, and also the copy of the original declaration and the copy of the original plea in said cause; which said bond and copies of declaration and plea aforesaid are respectively in the words and figures following, to wit:

*Bond for costs.*

United States of America, northern district of Illinois. In Circuit court, term A. D. 187 .

CHARLES E. COATES ET AL.
*vs.*
CHARLES COOPER ET AL.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and

stipulate that execution may issue against our property for any
5 costs taxed against.

Dated this 15th day of Jan'y, A. D. 1872.

HUTCHINSON & LUFF.

(Endorsed:) Filed Jan'y 15th, A. D. 1872. W'm H. Bradley, clerk.

*Copy declaration.*

United States of America, circuit court of the United States for the 7th circuit and northern district of Illinois, of the July term, A. D. 1870.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Charles E. Coates, George W. P. Coates, and J. Pennock Coates, co-partners, trading as Coates & Brothers, plaintiffs in this suit, who are citizens of the State of Maryland, by Hutchinson & Luff, their attorneys, complain of Charles Cooper, George Rogers, C. Gray Cooper, and Julius C. Debis, who are citizens of the State of Ohio, and Frank L. Fairchild, who is a citizen of the State of Illinois, co-partners, doing business as C. & G. Cooper & Co., defendants, who were summoned, &c., of a plea of trespass on the case upon promises. For that whereas the said defendants heretofore, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and seventy, at Baltimore, to wit, at Chicago in the district aforesaid, were indebted to the plaintiffs in the sum of five thousand dollars of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendants
6 and at the special instance and request of the said defendants, and being so indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

And whereas, also, the said defendants afterward, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiffs, the said defendants then and there undertook and faithfully promised the said plaintiffs that the said defendants would well and truly pay unto the said plaintiffs so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendants should be thereunto afterwards requested, and the said plaintiffs aver that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of five thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, on the same day and year and at the place aforesaid, had notice:

7 And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to the said plaintiffs in the further sum of five thousand dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiffs to the said defendants, and at the like request of

said defendants; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants and at the like request of said defendants; and for other money by the said defendants before that time had and received to and for the use of the said plaintiffs; and also in the further sum of five thousand dollars for so much money before that time and then due and payable from the said defendants to the said plaintiffs for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said plaintiffs, and by the said plaintiffs forborne to the said defendants for divers long spaces of time before then elapsed at the like special instance and request of the said defendants; and being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested;

8 And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiffs, and then and there being in arrears and unpaid, and upon such accounting the said defendants then and there were found to be in arrears and indebted to the said plaintiffs in the further sum of five thousand dollars of like lawful money as aforesaid; and being so found in arrears and indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendants should be thereunto afterwards requested: Nevertheless the said defendants (although often requested, etc.) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused and still do refuse, to the damage of the said plaintiffs of five thousand dollars, and therefore the said plaintiffs bring suit, etc.

HUTCHINSON & LUFF,
*Pl'ffs' Att'y.*

9 *Copy of account sued on.*

C. & G. Cooper & Co. to Coates & Bros., Dr.

| | |
|---|---|
| For goods, wares, and merchandise sold and delivered | $5,000 |
| " money paid | 5,000 |
| " " had & rec'd to pl'ffs use | 5,000 |
| " interest | 5,000 |
| " balance due on acc't stated | 5,000 |

*Copy of account sued on.*

LOCUST POINT ROLLING-MILL,
*Baltimore, February 7th*, 1870.

Mess. C. & J. Cooper & Co. to Coates & Brother, manufacturers of boiler, plate, boat, and flue iron, Dr.

Terms:

| Date of order. | No. plates. | Dimensions. | Quality. | Marks. | Weight. | Total prices. | |
|---|---|---|---|---|---|---|---|
| January 28... | 1 | 5-16 × 59 × 46..... | Flange..... | C. & J. & Co.. | 944 | 6¾ | $16 47 |
| | | Less freight a 40 cents p'r 100..... | | | | | 1 00 |
| | | | | | | | $15 47 |

LOCUST POINT ROLLING-MILL,
*Baltimore, Jan'y* 14, 1870.

Mess. C. & J. Cooper & Co. to Coates & Brother, manufacturers of boiler, plate, boat, and flue iron, Dr.

Terms:

| Date of order. | No. plates. | Dimensions. | Qu'lity. | Marks. | Weight. | Total prices. | |
|---|---|---|---|---|---|---|---|
| | 1 | 7-16 × 48 × 41..... | Flange..... | C. & J. C..... | 260 | 6¾ | $17 55 |
| | | Less freight a 40 cents p'r 100..... | | | | | 1 04 |
| | | | | | | | $16 51 |

LOCUST POINT ROLLING-MILL,
*Baltimore, Jan'y* 21, 1870.

10 Mess. C. & J. Cooper & Co. to Coates & Brother, manufacturers of boiler, plate, boat, and flue iron, Dr.

Terms:

| Date of order. | No. plates. | Dimensions. | Quality. | Marks. | Weight. | Total prices. | |
|---|---|---|---|---|---|---|---|
| | 1 | 7-16 × 54 × 41..... | Flange..... | C & J C..... | 276 | 6¾ | $18 63 |
| | | Less freight a 40 p'r 100..... | | | | | 1 10 |
| | | | | | | | $17 53 |

| Date of order. | No. plate. | Dimensions. | Quality. | Marks. | Weight. | Total prices | |
|---|---|---|---|---|---|---|---|
| | 7 | 5-16 × 31¼ × 48 | C H X 1 | C J C | 948 | | |
| | 10 | " × 29 × 49 | " | " " " | 1249 | | |
| | 12 | " × 29¼ × 55 | " | " " " | 1713 | | |
| | 3 | ¼ × 52 × 126 | " | " " " | 1541 | | |
| | 4 | 5-16 × 55 × 65 | " | " " " | 1352 | | |
| | 6 | ¼ × 52 × 128 | " | " " " | 3074 | | |
| | 5 | " × 46 × 120 | " | " " " | 2094 | | |
| | 12 | 5-16 × 32 × 54 | " | " " " | 1871 | | |
| | 2 | " × 31¼ × 48 | " | " " " | 266 | | |
| | 2 | ¼ × 46 × 121½ | " | " " " | 833 | 14941. 6c. | $896. 46 |
| | 4 | ¼ × 43½ dia. | Flange. | " " " | 863 | | |
| | 4 | 7-16 × 34½ × 40½ | " | " " " | 667 | | |
| | 4 | ⅜ × 40 × 48 | " | " " " | 827 | | |
| | 3 | " × 41 × 54 | " | " " " | 713 | | |
| | 3 | 5-16 × 28 × 46 | " | " " " | 366 | | |
| | 1 | " × 28 × 44 | " | " " " | 112 | | |
| | 2 | " × 34½ × 40½ | " | " " " | 266 | | |
| | 1 | " × 33 × 38 | " | " " " | 114 | | |
| | 1 | " × 44 × 49 | " | " " " | 190 | | |
| | 6 | " × 46 × 50½ | " | " " " | 1291 | 5409. 6½. | 365. 10 $1, 261 56 |
| | 92 | Less freight a 40c. p'r 100c | | | 20 350 | | 81 40 |
| | | | | | | | $1, 180 16 |

LOCUST POINT ROLLING-MILL,
*Baltimore, Jan'y* 20, 1870.

Mess. C. & J. Cooper & Co. to Coates & Brother, manufacturers o boiler, plate, boat, and flue iron, Dr.

Terms:

11

LOCUST POINT ROLLING-MILL,
*Baltimore, Jan'y* 21, 1871.

Mess. C. & J. Cooper & Co. to Coates & Brother, manufacturers of boiler, plate, boat, and flue iron, Dr.

Terms:

| Date of order. | No. plates. | Dimensions. | Quality. | Marks. | Weight. | Total prices | |
|---|---|---|---|---|---|---|---|
| | 6 | ¼ × 49 × 63½ | C H X 1. | C J C. | 1404 | | |
| | 3 | 5-16 × 31¼ × 48 | " | " " " | 413 | | |
| | 2 | " × 29 × 49 | " | " " " | 258 | | |
| | 3 | ¼ × 52 × 126 | " | " " " | 1498 | | |
| | 2 | 5-16 × 55 × 65 | " | " " " | 688 | | |
| | 1 | ¼ × 46 × 120 | " | " " " | 418 | | |
| | 4 | " × 46 × 121½ | " | " " " | 1656 | | |
| | | | | | | 6335. 6c. | $380 10 |
| | 2 | ¼ × 43½ dia. | Flanges. | " " " | 426 | | |
| | 2 | 7-16 × 34½ × 40½ | " | " " " | 366 | | |
| | 2 | ⅜ × 40 × 48 | " | " " " | 406 | | |
| | 3 | " × 41 × 54 | " | " " " | 714 | | |
| | 3 | 5-16 × 28 × 46 | " | " " " | 335 | | |
| | 5 | " × 28 × 44 | " | " " " | 589 | | |
| | 4 | " × 34 × 40½ | " | " " " | 593 | | |
| | 5 | " × 33 × 38 | " | " " " | 604 | | |
| | 5 | " × 44 × 49 | " | " " " | 898 | | |
| | 6 | 7-16 × 33 × 38 | " | " " " | 925 | | |
| | 6 | " × 41½ dia. | " | " " " | 1033 | 6819. 6½c. | 460. 28 $840 38 |
| | 64 | Less freight a 40c. p'r 100 | | | | | 53 02 |
| | | | | | | | $787 76 |

(Endorsed:) This may be filed as a copy of the narr. filed May 30, 1870.

COOPER, GARNETT & PACKARD,
*Dep'ts Att'ys.*

Filed this 15th day of January, A. D. 1872.

W'M H. BRADLEY, *Clerk.*

12 *Copy plea.*

Circuit court of the United States, northern district of Illinois, July term, 1870.

CHARLES E. COATES, GEORGE W. P. COATES, & J. Pennock Coates,
*vs.*
CHARLES COOPER, C. GRAY COOPER, FRANK L. Fairchild, George Rogers and Julius C. Debis.

And the said defendants, by Cooper & Packard, their attorneys, come and defend the wrong and injury, when, &c., and say they did not undertake nor promise, in manner and form as the plaintiffs have above thereof complained against them, and of this they put themselves upon the country, &c.

COOPER & PACKARD,
*Def'ts Att'ys.*

(Endorsed:) This may be filed as a copy of the plea filed July 5, 1870.
COOPER, GARNETT & PACKARD,
*Def'ts' Att'ys.*

Filed Jan'y 15, 1872.
W'M H. BRADLEY, *Clk.*

13 On this day, to wit, the 27th day of May, A. D. 1872, came said defendants, by their attorneys, and filed in said court, with the clerk thereof, their motion to suppres' deposition in said entitled cause, which said motion is in the words and figures following, to wit:

*Motion to suppress depositions.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Circuit court of the United States for the northern district of Illinois, and 7th judicial district.

CHARLES E. COATES, GEORGE W. COATES, AND J. Pinnock Coates,
*vs.*
CHARLES COOPER, GEORGE ROGERS, FRANK L. Fairchild, C. Gray Cooper, and Julius C. Debis.
Objections to depositions.

And now come the said defendants, by Cooper, Garnett & Packard, their attorneys, and move to suppress the depositions of John W. White and James Simmons, filed in said cause, for the following causes:

1st. Because the caption to the deposition signed "John W. White" does not sufficiently and particularly show that the same is the deposition of John W. White, the witness named in the commission.

2nd. The certificate of H. H. Green, who is named as the commissioner in the dedimus potestatem, does not state that the interrogatories and cross-interrogatories were read over to the witness before the answers thereto were written down.

14 3d. Because the certificate of said commissioner is otherwise uncertain and imperfect and insufficient.

And the said defendants, by their said attorneys, further move to strike out from the deposition of John W. White so much of his answer

to the 5th direct interrogatory as gives the time of the receiving the iron spoken of by him, its weight and the date of delivery, for the following reason: That said witness, in his answer to the 3rd cross-interrogatory, says that he delivers his information concerning said matters from papers and books, which papers and books are not attached to said deposition, nor the correctness of the same sworn to by said witness.

And the said defendants, by their said attorneys, further move to suppress the exhibits, marked one, two, three, and four, attached to the said deposition of John W. White, for the following reasons:

1st. Because the said exhibits are not properly identified by said witness.

2d. Because they are not identified or mentioned in the certificate of said commissioner.

3d. Because it does not appear from said deposition that the original of said exhibits have any relevancy to the matters in controversy in this suit, nor by whom the originals, from which said duplicates purport to be made, were signed or delivered.

And said defendants, by their said attorneys, further move to
15 strike out so much of the answer of said John W. White to the 14th cross-interrogatory in his disposition as is not responsive to the question asked him in said cross-interrogatory.

And the said defendants, by their said attorneys, further move to strike out from the deposition of George Biays his answer to the 7th direct interrogatory, because the said witness in his answer to the 18th cross-interrogatory states that he only knows from general reputation, and not of his own knowledge, who composed the firm of C. & G. Cooper & Co. after January 1st, 1870; also his answer to the 5th and 9th direct interrogatories for the same reason, and because he states in his answer to the 4th cross-interrogatory that he supposes the orders spoken of were burned up in the great fire of Chicago, for the reason that they were filed with the commissioner in Baltimore, and he supposes the commissioner did his duty and sent the orders on to Chicago.

And said defendants by their said attorneys further move to strike out so much of the answer of Charles E. Coates to the 7th direct interrogatory propounded to him as states that C. Gray Cooper and Julius C. Debis were members of the firm of C. & G. Cooper & Co.; and so much of the answer of George W. P. Coates to the 7th direct interrogatory propounded to him as states that he is credibly informed who composed the firm of C. & G. Cooper & Co., and his answer to the 9th
16 direct interrogatory, because the said Charles E. Coates in his answer to the 18th cross-interrogatory states that he only knows that C. Gray Cooper and Julius C. Debis were members of said firm from information derived from reliable persons, and because the said George W. P. Coates in the commencement of his answer to the 7th direct interrogatory, and in his answer to the 18th cross-interrogatory propounded to him, states that he does not know of his own knowledge who composed said firm, and only knows from general reputation.

COOPER, GARNETT & PACKARD,
*Def'ts' Att'ys.*

CHICAGO, *May* 27th, 1872.

(Endorsed:) Filed May 27, 1872. Wm. H. Bradley, clerk.

On this day, to wit, the 28th day of May, in the adjourned May term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

CHARLES E. COATES ET AL. } Assumpsit.
*vs.*
CHARLES COOPER ET AL. }

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant to suppress the depositions of John W. White and James Simmons, taken on part of the plaintiffs
17 and filed herein, and after hearing the arguments of counsel the court overrules said motion, to which the defendants by their attorney except, and this cause being now called for trial upon issue joined thereupon come a jury of good and lawful men, to wit: G. Goodwin, Ephraim Gilmore, Thomas Johnson, S. K. Miner, H. M. Lyman, H. M. Clark, Ellison Newport, George S. Malley, E. W. Beach, R. H. Cotton, James McClure, and Henry Dudley, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 29th day of May, in said May term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

CHARLES E. COATES ET AL. } Assumpsit.
*vs.*
CHARLES COOPER ET AL. }

Now come the parties again by their attorneys, and now comes also the jury in this behalf empanneled and sworn, and after hearing the concluding evidence and the arguments of counsel and receiving the instructions of the court the jury retired to consider of their verdict, and, by agreement of the parties by their attorneys, the jury,
18 when they shall have agreed upon a verdict, may sign and seal the same and deliver it to the clerk and disperse; and after a short absence the jury returned into court their sealed verdict, wherein they say: We, the jury, find the issue for the plaintiffs, and assess their damages to the sum of twenty-two hundred and eighty-nine dollars and seventy-eight cents.

And thereupon the defendants, by their attorney, move the court for a new trial herein.

On this day, to wit, the 10th day of June, A. D. 1872, came said defendants, by their attorneys, and filed in said court with the clerk thereof their motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

*Motion for new trial.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

United States circuit court for northern district of Illinois and 7th judicial circuit.

CHARLES E. COATES, GEORGE W. P. COATES, and J. Pennock Coates,
*vs.*
CHARLES COOPER, GEORGE ROGERS, FRANK L. Fairchild, C. Gray Cooper, and Julius C. Debis.

And now come the said defendants, by Cooper, Garnett and

Packard, their attorneys, and move to have the verdict of the jury in the above-entitled cause set aside and a new trial granted to the defendents therein, and to have the judgment on said verdict arrested, and assign as causes therefor the following, amongst other reasons, viz:

1. The verdict of the jury is contrary to the law and the evidence.

2. The court erred on the trial of said cause in refusing to strike out the depositions offered and read on the part of plaintiffs certain questions and certain answers, contrary to the motion of defendants' counsel.

3d. The court erred in refusing the motion of defendants' counsel to suppress the depositions of White and Simmons, and allowing the same to be read in evidence on the trial.

4th. The court erred in refusing the request of defendants' counsel to charge the jury that before the plaintiffs could recover in this suit they must prove the partnership of the plaintiffs or their joint interest in the cause of action.

5th. The court erred in refusing the request of defendants' counsel to charge the jury that before the plaintiffs could recover in this suit they must prove the partnership of the defendants or the joint liability of each of the defendants.

6th. The court erred in his charge to the jury in reference to
20 the recovery of interest by the plaintiffs.

7th. The evidence of the plaintiffs does not support or prove the cause of action laid in the declaration.

8th. The evidence of the plaintiffs establishes a liability, if at all, on the part of other and different parties than the defendants named in the declaration.

9th. The evidence of the plaintiffs shows a cause of action, if at all, due and accrued to different parties than the plaintiffs named in the declaration.

COOPER, GARNETT & PACKARD,
*Def'ts' Att'ys.*

(Endorsed:) Filed June 10th, 1872. Wm. H. Bradley, c'lk.

On this day, to wit, the 25th day of June, in the said May term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

CHARLES E. COATES, GEORGE W. P. COATES, and J. Pennock Coates,
*vs.*
CHARLES COOPER, GEORGE ROGERS, C. GRAY Cooper, Julius C. Debis, and Frank L. Fairchild.
} Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered for a new trial of this cause, and after hearing the arguments of the plaintiffs'
21 attorney the court overrules said motion.

It is therefore considered and adjudged by the court that the plaintiffs do have and recover of the defendants the said sum of twenty-two hundred and eighty-nine dollars and seventy-eight cents, their damages so as aforesaid assessed, together with their costs in this behalf expended, amounting to the sum of one hundred and one dollars and forty cents, and that they have execution therefor.

On the hearing of said cause the following exceptions were taken,

and were allowed by the court and made of record. Which said exceptions are in the words and figures following, to wit:

*Bill of exceptions.*

UNITED STATES OF AMERICA,
*Northern district of Illinois, ss:*

In the circuit court of the United States for the seventh circuit, and northern district of Illinois. Of May term, A. D. 1872.

CHARLES E. COATES, GEORGE W. P. COATES, and J. Pennock Coates,
*vs.*
CHARLES COOPER, GEORGE ROGERS, C. GRAY Cooper, Julius C. Debis, and Frank L. Fairchild.

Be it remembered that on the trial of this cause, to wit, on the
22 27th day of May, A. D. 1872, which was to recover the price of five bills of iron, claimed to have been sold and delivered by the plaintiffs, of Baltimore, Maryland, to the defendants, of Mount Vernon, Ohio, as follows, to wit:

| | | | |
|---|---|---|---|
| 1870. | Jan'y 21. | 1 plate iron, weighing ..... | 276 pounds. |
| " | " 20. | 92 plates iron, weighing..... | 20,350 " |
| " | " 21. | 64 plates iron, weighing ..... | 13,154 " |
| " | Feb'y 7. | 1 plate iron, weighing ..... | 244 " |
| " | Jan'y 14. | 1 plate iron, weighing ..... | 260 " |

Under contract claimed to have been made by said defendants with the plaintiffs.

The plaintiffs to maintain the issue on their part and to prove the delivery of four of the said bills of iron in question at Mount Vernon, Ohio, offered to read in evidence the deposition of John W. White, which was as follows, to wit:

Interrogatory 1st. What is your name, age, occupation, and place of residence?

Answer. Name, John W. White; age, 57 years; occupation, railroad clerk; residence, Mount Vernon, Ohio.

Interrogatory 2d. Do you know the parties to this suit, or either, and which of them, and how long have you known them respectively?

Answer. I don't know the plaintiffs to this suit. I know all the defendants except Debis; I have no personal acquaintance with him; had known Charles Cooper 23 years. I have known George Rogers and C. Gray Cooper since they were boys; have known Fairchild 4 or 5 years.

Interrogatory 3d. What was your occupation, and by whom
23 were you employed in the months of January and February, 1870?

Answer. I was an agent of the Baltimore and Ohio Railroad Company, at Mount Vernon, Ohio, and was in the employ of said railroad company in the Lake Erie division, at Mount Vernon, Ohio, during the months of January and February, 1870.

Interrogatory 4th. Do you know of the delivery to C. & G. Cooper & Co., of Mount Vernon, in the months of January and February, 1870, of certain plates of iron received by the Baltimore and Ohio Railroad Company?

Answer. I do know of the delivery of certain plates of iron to C. & G. Cooper & Co., in the months of January and February, 1870, received by the Baltimore and Ohio Railroad Company, at Mount Vernon, Ohio.

Interrogatory 5th. If you have stated, in answer to the last preceding interrogatory, that you do know of the delivery of the iron therein referred to, describe the said iron as fully as you can, giving the number of plates, weights, and marks, and state where and by whom it was shipped, to whom it was billed, and when it was delivered.

Answer. It was shipped to C. & J. Cooper & Co. I do not know the marks on the iron. On Jan'y 26, 1870, received 1 plate; weight, 276 pounds. Jan'y 29, received two shipments: one consisting of 92 plates; weight, 20,350 pounds; and one shipment of 64 plates; weight, 13,154 pounds. On the 14th of February, 1870, we received one plate of
24 iron; weight, 244 pounds. The above plates of iron were delivered to the teamsters of C & G. Cooper & Co. on the dates they were received, or within a day or two afterwards. The freight-bills were paid by the firm of C. & J. Cooper & Co.

Cross-interrogatories:

Are the answers you have made to the direct interrogatories based upon your own personal knowledge?

Answer. Partly upon my own knowledge, and partly to papers and books.

Cross-interrogatory. Have you a distinct recollection of the transaction about which you have testified, or do you receive any assistance, in making your statements, from any written memorandum?

Answer. I have a personal recollection of C. & G. Cooper & Co. getting plates of iron, but the dates of receiving, and the time of delivery to them, and the weights of the iron, I derived from papers and books.

Cross-interrogatory. If you have referred at any time to any writing or memorandum to assist you in testifying in this case, please say so.

Answer. I have referred to written memorandum to assist me in giving my testimony in this case.

Cross-interrogatory. Do you have a distinct recollection of the facts you have stated without reference to any such memorandum, or
25 do you rely wholly upon such memorandum in making said statements?

Answer. I have a distinct recollection of the iron being received at the depot, and of the same being delivered to the teamsters of C. & G. Cooper & Co., but the time of receiving, and the date of delivery, to the teamsters, and the weights of the iron, I derive from papers and books.

Cross-interrogatory. Do you personally take a part in the handling of such parcels, or is it done by others, under your orders?

I have sometimes assisted in the handling of freights, but it is mostly done by others in the employ of the company, under our directions.

Cross-interrogatory. Did you count the plates of iron which you say were delivered to the teamsters of C. & G. Cooper & Co.?

Answer. I did not; but suppose they were correct, as no complaint was made for shortage by C. & G. Cooper & Co.

Cross-interrogatory. Did you weigh said plates?

Answer. I did not.

Cross-interrogatory. Have you not stated that you did not know who said iron was from?

Answer. I do not know from my own knowledge who said iron was from.

26 Thereupon the counsel for the defendants objected to the reading of so much of the answers of the witness as relate to the time of receiving, and date of delivery to the teamsters, and the weights of the iron, testified to by the witness, and moved the court to have the same stricken out and excluded from the jury, (having previously filed a notice in writing for that purpose,) on the ground that the witness, in answer to the cross-interrogatories forming part of said deposition, states that he derives his information concerning that part of his answers objected to from papers and books, which papers and books are not attached to said deposition, or offered in evidence, or the non-production of the same in any manner accounted for; nor does the witness state, nor does it appear, that said papers and books were written or kept by him, or by any one, in the usual course of business; but the court overruled the said objection and permitted the same to be received and read to the jury as evidence in the case, assigning as his reason for so doing that the fair presumption was that the books and papers referred to were the books kept by the witness in the course of his business as railroad agent.

To which ruling of the court the defendants by their counsel then and there excepted.

The above testimony was all that was offered to prove the delivery in Mount Vernon, Ohio, of the four bills of iron testified to by the
27 said witness, White, but the plaintiffs showed by the depositions of several witnesses that said iron was shipped to defendants from plantiffs' manufactory in Baltimore, Maryland, in pursuance of written orders from defendants to plaintiffs, the orders being signed in the firm-name of C. & G. Cooper & Co., and that it was marked C. & J. Cooper & Co., and shipped on board the Baltimore and Ohio Railroad by the plaintiffs, so marked at Baltimore, Md., a few days prior to the dates mentioned in said deposition of White hereinbefore stated, and that the bills of lading for these shipments were mailed by one of the plaintiffs to C. & J. Cooper & Co., Mount Vernon, Ohio, and never came back to the plaintiffs, to their knowledge, and they would have known it if they had come back.

Nor was there any evidence offered to account for the non-production of the papers and books referred to by the witness, White, in said deposition, or evidence of who wrote or kept the same except what may be gathered from what is stated by the said witness, White, in his said deposition as hereinbefore set out.

No evidence was given of any partnership of the plaintiffs, or that they composed a firm known as Coates & Brother.

There was no evidence introduced of any express contract, promise, or agreement on the part of the defendants to pay any interest on the bills or account, or of any custom or usage of trade authorizing the
28 plaintiffs to charge interest. Nor was there evidence that the account sued upon had ever been adjusted by the defendants or even presented to them; there was no evidence, however, that the iron in question had been sold upon credit.

The only evidence in regard to the non-payment of the account sued upon was that the plaintiffs at Baltimore, Maryland, had shortly after they shipped the iron in question drawn a draft or drafts on the defendants at Mount Vernon, Ohio, which drafts had been returned to them for non-acceptance.

This was the substance of all the testimony introduced on any of the points raised by this bill of exceptions.

After the plaintiffs and defendants had rested, and the arguments had

been concluded on both sides, the defendants duly moved the court to instruct the jury:

1. That it was necessary for the plaintiffs in this case to prove the partnership or joint liability of the defendants, before they were entitled to recover.

2. That it was necessary for the plaintiffs to prove that they were partners or joint payees, to entitle them to recover in this suit.

3. That there was no sufficient proof of the delivery in question in Mount Vernon, Ohio, to justify the jury in finding a verdict for the plaintiffs.

But the court refused to give said instructions, or either of them.

To the refusal of the court to give said instructions, and each of
29 them, the defendants by their counsel then and there duly excepted.

And thereupon the court instructed the jury as follows:

1. It is not necessary for the plaintiffs in this suit to prove the partnership or joint liability of the defendants, because such proof is rendered unnecessary by the statute of the State of Illinois, there being no issue calling for such proof.

(To the giving of which instruction the defendants by their counsel then and there duly excepted.)

The court further instructed the jury:

2. That it is unnecessary for the plaintiffs in this suit to prove that they were partners or joint payees, because such proof is rendered unnecessary by the statute of the State of Illinois under the issue in this case.

(To the giving of this instruction the counsel for the defendants then and there excepted.)

The court further instructed the jury:

3. That they should, if they found for the plaintiffs, allow interest in their estimate of damages on the accounts from the date of the receipt by the defendants of the last item at the rate of six per cent. per annum.

(To the giving of which last instruction the counsel for the defendants also then and there excepted.)

Thereupon the jury found a verdict for the plaintiffs, which the
30 defendants moved to set aside and for a new trial, but the court overruled the said motion, and entered up judgment on the verdict.

And inasmuch as the matters aforesaid do not appear of record, the counsel for the defendants present the court with this bill of exceptions, and prays that it may be signed, sealed, and made a part of the record in the case. And it is done accordingly.

[SEAL.] H. W. BLODGETT,
*Judge.*

(Endorsed:) Filed June 25th, 1872.

W'M H. BRADLEY,
*Clerk.*

31 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein said Charles E. Coates et al. are plaintiffs and said Charles Cooper et al. defendants, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the

seal of said circuit court, at my office in the city of Chicago, in said district, this third day of September, A. D. one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

[SEAL.] WM H. BRADLEY,
*Clerk.*

[5-cent int-rev. stamp, cancelled.]

32 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, December term, A. D. 1872.

CHARLES COOPER, GEORGE ROGERS, C. GRAY Cooper, Julius C. Debis, and Frank L. Fairchild, plaintiffs in error,
*vs.*
CHARLES E. COATES, GEORGE W. P. COATES, and J. Pennock Coates, defendants in error.

And now the said Charles Cooper, George Rogers, C. Gray Cooper, Julius C. Debis, and Frank L. Fairchild, plaintiffs in error, come and say that in the record and proceedings aforesaid there is a manifest error in this, to wit:

1. The circuit court erred in overruling the objection of the defendants (in the court below) to the reading to the jury of so much of the answers of the witness John W. White as relate to the weight, time of receiving in Mount Vernon, Ohio, and date of delivery to the teamsters of C. & G. Cooper & Co. of the iron testified to by him.

2. The court erred in overruling the motion of the defendants (in the court below) to strike out and exclude from the jury that part of
33 the depositions of the witness John W. White which related to the weight, time of receiving, and delivery of the iron testified to by him.

3. The court erred in refusing to instruct the jury as prayed by the defendants (below) "That it was necessary for the plaintiffs in this case to prove the partnership or joint liability of the defendants before they were entitled to recover."

4. The court erred in refusing to instruct the jury, as prayed by the defendants, below, "That it was necessary for the plaintiffs to prove that they were partners or joint payers to entitle them to recover in this suit."

5. The court erred in refusing to instruct the jury as prayed by defendants, below, "That there was no sufficient proof of the delivery of the iron in question in Mount Vernon, Ohio, to justify the jury in finding a verdict for the plaintiffs."

6. The court erred in instructing the jury that "It is not necessary for the plaintiffs in this suit to prove the partnership or joint liability of the defendants, because such proof is rendered unnecessary by the statute of the State of Illinois, there being no issue calling for such proof."

7. The court erred in instructing the jury as follows, to wit:
34 "It is unnecessary for the plaintiffs in this suit to prove that they were partners or joint payees, because such proof is rendered unnecessary by the statute of the State of Illinois under the issue in this case."

8. The court erred in instructing the jury "That they should, if they found for the plaintiffs, allow interest in their estimate of damages on the accounts from the date of the receipt by the defendants of the last item, at the rate of six per cent. per annum."

9. The court erred in admitting improper evidence.

10. The court erred in refusing to give instructions asked for by defendants below.

11. The court erred in instructing the jury.

Wherefore the said plaintiffs in error pray that said judgment may be reversed, &c.

*Att'y for the Plaintiffs in Error.*

35 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a udgment in a plea, which is in the said court before you between Charles E. Coates, George W. P. Coates, and Frank Coates, plaintiffs, and Charles Cooper, George Rogers, C. Gray Cooper, Julius C. Debis, and Frank S. Fairchild, defendants, a manifest error hath happened, to the great damage of the said Charles Cooper, George Rogers, C. Gray Cooper, Julius C. Debis, and Frank S. Fairchild, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send
36 the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this third day of July, A. D. 1872, and of our Independence the 96th.

[SEAL.] W'M H. BRADLEY,
*Clerk.*

37 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

I, W'm H. Bradley, clerk of the circuit court of the United States for the said northern district of Illinois, certify hereby that a copy of the within writ of error was lodged in my office by the 3d day of July, A. D. 1872.

W'M H. BRADLEY,
*Clerk.*

(Indorsed:) Circuit court U. S. northern district of Ill.; Charles E. Coates et al. vs. Charles Cooper et al. Writ of error.

38 The United States of America, greeting:

Charles E. Coates, George W. P. Coates, and J. Pennock Coates: You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the seventh

circuit and the northern district of Illinois, wherein Charles Cooper, George Rogers, C. Gray Cooper, Julius C. Debis, and Frank L. Fairchild are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plain-
39 tiff in error, as in the said writ of error maintained, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, presiding judge of the circuit court of the United States for the northern dist. of Ill's, this fifth day of July, A. D. 1872.

H. W. BLODGETT,
*Judge.*

On this 7th day of September, A. D. 1872, personally appeared H. P. Nichols before me the subscriber, and makes oath that he delivered a true copy of the within citation to Mess. Hutchinson & Luff, the attorneys for the said defendants in error.

H. P. NICHOLS.

Sworn to & subscribed before me this 7th day of September, A. D. 1872.

W'M H. BRADLEY,
*Clerk.*

(Indorsement on cover:) No. 351. Charles Cooper, George Rogers, C. Gray Cooper, J. C. Debis, and Frank L. Fairchild, plaintiffs in error, vs. Charles E. Coates, Geo. W. P. Coates, and J. Pennock Coates, N. Illinois, C. C. U. S. Filed 9th December, 1872.

# Supreme Court of the United States.

## DECEMBER TERM, A. D. 1872.

CHARLES COOPER,
GEORGE ROGERS,
C. GRAY COOPER,
JULIUS C. DEBIS, AND
FRANK L. FAIRCHILD,
*Plaintiffs in Error,*
*vs.*
CHARLES E. COATES,
GEORGE W. P. COATES, AND
J. PENNOCK COATES,
*Defendants in Error.*

*In error to the Circuit Court of the United States for the Northern District of Illinois.*

# BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Cushing, Thomas & Co., Steam Printers, 150 & 152 Clark St., Chicago.

# Supreme Court of the United States.

DECEMBER TERM, A. D. 1872.

CHARLES COOPER,
GEORGE ROGERS,
C. GRAY COOPER,
JULIUS C. DEBIS, AND
FRANK L. FAIRCHILD,
*Plaintiffs in Error,*
*vs.*
CHARLES E. COATES,
GEORGE W. P. COATES, AND
J. PENNOCK COATES,
*Defendants in Error.*

*In error to the Circuit Court of the United States for the Northern District of Illinois.*

## STATEMENT OF THE CASE.

This was an action in assumpsit, by the defendants in error against the plaintiffs in error.

The declaration begins as follows: [Record, page 5].

"*United States of America, Circuit Court of the United States, for the 7th Circuit and Northern District of Illinois, of the July Term, A. D.* 1870.

*Northern District of Illinois,* ss.

Charles E. Coates, George W. P. Coates, and J. Pennock Coates, copartners, trading as Coates & Brothers, plaintiffs in

this suit, who are citizens of the State of Maryland, by Hutchinson & Luff, their attorneys, complain of Charles Cooper, George Rogers, C. Gray Cooper, and Julius C. Debis, who are citizens of the State of Ohio; and Frank L. Fairchild, who is a citizen of the State of Illinois, copartners, doing business as C. & G. Cooper & Co., defendants, who were summoned, etc., of a plea of trespass on the case upon promises.

For that whereas, the said defendants on, to-wit: The first day of May, in the year of our Lord, one thousand eight hundred and seventy, at Baltimore, to-wit: at Chicago, in the District aforesaid, were indebted to the paintiffs in the sum of five thousand dollars," etc., etc.

[Page 6.] And throughout the balance of the declaration the parties are simply referred to as "plaintiffs" and "defendants" without any addition of "*as co-partners as aforesaid*," or indeed any intimation whatever that the parties were *co-partners* when the considerations were received, and the promises made, described in the different counts.

[Page 12.] To this declaration the defendants plead the general issue.

[Page 22.] The suit was brought to recover "the price of five bills of iron claimed to have been sold and delivered by the plaintiffs, of Baltimore, Maryland, to the defendants, of Mount Vernon, Ohio, as follows, to-wit:

| | | | |
|---|---|---|---|
| 1870. | Jan'y 21, | 1 plate iron weighing | 276 pounds. |
| " | " 20, | 92 plates iron weighing | 20,350 " |
| " | " 21, | 64 plates iron weighing | 13,154 " |
| " | Feb'y 7, | 1 plate iron weighing | 244 " |
| " | Jan'y 14, | 1 plate iron weighing | 260 " |

under contract clamed to have been made by said defendants with the plaintiffs.

The plaintiffs, to maintain the issue on their part and to prove the delivery of four of the said bills of iron in question at Mount Vernon, Ohio, offered to read in evidence the deposition of John W. White, which was as follows, to-wit:

Interrogatory 1st. What is your name, age, occupation, and place of residence?

Answer. Name, John W. White; age, 57 years; occupation, railroad clerk; residence, Mount Vernon, Ohio.

Interrogatory 2d. Do you know the parties to this suit, or either, and which of them, and how long have you known them respectively?

Answer. I don't know the plaintiffs to this suit. I know all the defendants except Debis. I have no personal acquaintance with him. Have known Charles Cooper 23 years. I have known George Rogers and C. Gray Cooper since they were boys. Have known Fairchild four or five years.

[Page 23.] Interrogatory 3d. What was your occupation and by whom were you employed in the months of January and February, 1870?

Answer. I was an agent of the Baltimore and Ohio Rail Road Company at Mount Vernon, Ohio, and was in the employ of said Rail Road Company in the Lake Erie Division at Mount Vernon, Ohio, during the months of January and February, 1870.

Interrogatory 4th. Do you know of the delivery to C. & G. Cooper & Co., of Mount Vernon, in the months of January and February, 1870, of certain plates of iron received by the Baltimore and Ohio Rail Road Company?

Answer. I do know of the delivery of certain plates of iron

to C. & G. Cooper & Co., in the months of January and February, 1870, received by the Baltimore and Ohio Rail Road Company at Mount Vernon, Ohio.

Interrogatory 5th. If you have stated in answer to the last preceding interrogatory that you do know of the delivery of the iron therein referred to, describe the said iron as fully as you can, giving the number of plates, weights and marks, and state when and by whom it was shipped, to whom it was billed, and when it was delivered.

*Answer.*—It was shipped to C. and *J.* Cooper & Co. I do not know the marks on the iron.

On Jan. 26, 1870, received 1 plate, weight 276 pounds. January 29, received two shipments—one consisting of 92 plates, weight, 20,350 pounds; and one shipment of 64 plates, weight, 13,154 pounds.

[Page 24.] On the 14th of February, 1870, we received 1 plate of iron, weight, 244 pounds.

The above plates of iron were delivered to the teamsters of C. and *G.* Cooper & Co., on the dates they were received, or within a day or two afterwards. The freight bills were paid by the firm of C. and *G.* Cooper & Co.

CROSS-INTERROGATORY.

Are the answers you have made to the direct interrogatories based upon your own personal knowledge?

Answer. Partly upon my own knowledge, and partly to papers and books.

CROSS-INTERROGATORY.

Have you a distinct recollection of the transaction about

which you have testified, or do you receive any assistance in making your statements from any written memorandum?

Answer. I have a personal recollection of C. and *G.* Cooper & Co., getting plates of iron, but the dates of receiving and the time of delivery to them, and the weights of the iron, I derived from papers and books.

CROSS-INTERROGATORY.

If you have referred at any time to any writing or memorandum, to assist you in testifying in this case, please say so.

Answer. I have referred to written memorandum to assist me in giving my testimony in this case.

CROSS-INTERROGATORY.

Do you have a distinct recollection of the facts you have stated without reference to any such memorandum, or do you rely wholly upon such memorandum in making said statements?

Answer. I have a distinct recollection of the iron being received at the depot, and of the same being delivered to the teamsters of C. and *G.* Cooper & Co., but the time of receiving and the date of delivery to the teamsters, and the weights of the iron I derive from papers and books.

CROSS-INTERROGATORY.

Do you personally take a part in the handling of such parcels, or is it done by others, under your orders?

Answer. I have sometimes assisted in the handling of freights, but it is mostly done by others in the employ of the company under our directions.

CROSS-INTERROGATORY.

Did you count the plates of iron which you say were delivered to the teamsters of C. & *G.* Cooper & Co.?

Answer. I did not, but suppose they were correct as no complaint was made for shortage by C. & *G.* Cooper & Co.

CROSS-INTERROGATORY.

Did you weigh said plates?

Answer. I did not.

CROSS-INTERROGATORY.

Have you not stated that you did not know who said iron was from?

Answer. I do not know from my own knowledge who said iron was from.

[Page 26.] Thereupon the counsel for the defendants objected to the reading of so much of the answers of the witness as relate to the time of receiving and date of delivery to the teamsters, and the weights of the iron testified to by the witness. And moved the Court to have the same stricken out and excluded from the jury, (having previously filed a notice in writing for that purpose,) on the ground that the witness in answer to the cross-interrogations forming part of said deposition, states that he derives his information concerning that part of his answers objected to from papers and books, which papers and books are not attached to said deposition or offered in evidence, or the non-production of the same in any manner accounted for, nor does the witness state, nor does it appear that said papers and books were written or kept by him or by any one in the usual course of business; but the Court overruled

the said objections and permitted the same to be received and read to the jury as evidence in the case, assigning as his reason for so doing, that the fair presumption was that the books and papers referred to were the books kept by the witness in the course of his business as railroad agent.

To which ruling of the Court the defendants by their counsel then and there excepted.

[Page 27.] The above testimony was all that was offered to prove the delivery in Mount Vernon, O., of the four bills of iron, testified to by the said witness White, but the plaintiffs showed by the depositions of several witnesses that said iron was shipped to defendants from plaintiffs' manufactory in Baltimore, Maryland, in pursuance of written orders from defendants to plaintiffs, the orders being signed in the firm name of C. & *G.* Cooper & Co., and that it was marked C. & *J.* Cooper & Co., and shipped on board the Baltimore & Ohio Rail Road by the plaintiffs, so marked at Baltimore, Md. a few days prior to the dates mentioned in said deposition of White, hereinbefore stated, and that the bills of lading for these shipments were mailed by one of the plaintiffs to C. & *J.* Cooper & Co., Mount Vernon, Ohio, and never came back to the plaintiffs to their knowledge and they would have known it if they had come back.

Nor was there any evidence offered to account for the non-production of the papers and books referred to by the witness, White, in said deposition, or evidence of who wrote or kept the same except what may be gathered from what is stated by the said witness White in his said deposition as hereinbefore set out.

No evidence was given of any partnership of the plaintiffs, or that they composed a firm, known as Coates & Brother.

There was no evidence introduced of any express contract, promise or agreement on the part of the defendants, to pay any interest on the bills, or account, or of any custom or usage of trade, authorizing the plaintiffs to charge interest. Nor was [page 28] there evidence that the account sued upon had ever been adjusted by the defendants, or even presented to them; there was no evidence however, that the iron in question had been sold upon credit.

The only evidence in regard to the non-payment of the account sued upon, was that the plaintiffs at Baltimore, Maryland, had shortly after they shipped the iron in question drawn a draft or drafts on the defendants, at Mount Vernon, Ohio, which drafts had been returned to them for non-acceptance.

This was the substance of all the testimony introduced on any of the points raised by this bill of exceptions.

After the plaintiffs and defendants had rested, and the arguments had been concluded on both sides, the defendants duly moved the Court to instruct the jury:

1. That it was necessary for the plaintiffs in this case, to prove the partnership or joint liability of the defendants before they were entitled to recover.

2. That it was necessary for the plaintiffs to prove that they were partners or joint payees to entitle them to recover in this suit.

3. That there was no sufficient proof of the delivery of the iron in question, in Mount Vernon, Ohio, to justify the jury in finding a verdict for the plaintiffs.

But the Court refused to give said instructions or either of them.

[Page 29.] To the refusal of the Court to give said instructions, and each of them, the defendants by their counsel then and there excepted.

And thereupon the Court instructed the jury as follows:

1. It is not necessary for the plaintiffs in this suit to prove the partnership or joint liability of the defendants, because such proof is rendered unnecessary by the statute of the State of Illinois, there being no issue calling for such proof.

(To the giving of which instruction the defendants by their counsel then and there duly excepted.)

The Court further instructed the jury:

2. That it is unnecessary for the plaintiffs in this suit to prove that they were partners or joint payees, because such proof is rendered unnecessary by the statute of the State of Illinois under the issue in this case.

(To the giving of this instruction the counsel for the defendants then and there excepted.)

The Court further instructed the jury:

3. That they should, if they found for the plaintiffs allow interest in their estimates of damages on the account from the

date of the receipt by the defendants of the last item, at the rate of six per cent. per annum.

(To the giving of which last instruction the counsel for the defendants also then and there excepted.)

[Page 30.] Thereupon the jury found a verdict for the plaintiffs, which the defendants moved to set aside and for a new trial, but the court overruled the said motion and entered up judgment on the verdict."

To reverse this judgment the plaintiffs in error prosecute this writ of error.

## ASSIGNMENT OF ERRORS RELIED UPON.

I.

The Court erred in overruling the objection of the defendants, below, to the reading to the jury of the following portion of the deposition of the witness, John W. White, to-wit: (see record pages 24 and 26.)

"On January 26, 1870, received 1 plate, weight 276 pounds; January 29, received two shipments, one consisting of 92 plates, weight, 20,350 pounds, and one shipment of 64 plates, weight, 13,154 pounds. On the 14th day of February, 1870 we received 1 plate of iron, weight, 244 pounds."

II.

The Court erred in overruling the motion of defendants, below, to strike out and exclude from the jury that portion of the deposition of the witness John W. White, which is as follows, to-wit: [Record page 24.]

"On January 26, 1870, received one plate, weight, 276 pounds; January 29, received two shipments, one consisting of 92 plates, weight, 13,154 pounds, and one shipment of 64 plates, weight, 20,350 pounds. On the 14th of February, 1870, we received 1 plate of iron, weight, 244 pounds."

III.

The Court erred in refusing to instruct the jury as prayed by the defendants, below, "that it was necessary for the plaintiffs in this case to prove the partnership or joint liability of the defendants, before they were entitled to recover."

IV.

The court erred in instructing the jury "that it is not necessary for the plaintiffs in this suit to prove the partnership or joint liability of the defendants, because such proof is rendered unnecessary by the statute of the State of Illinois, there being no issue calling for such proof."

V.

The court erred in instructing the jury "that they should, if they found for the plaintiffs allow interest in their estimate of damages on the accounts from the date of the receipt by the defendants of the last item, at the rate of six per cent. per annum."

# POINTS:

That portion of White's deposition relating to the weight of the iron was hearsay and inadmissible. (Record pages 24 and 25.)

1 *Greenleaf on Ev.* 82, 115 & 116 (12*th Ed. by Redfield.*)

1 *Phillips on Ev.* (5*th Am. Ed. Cowan & Hill's notes*) *top p.* 469 *and notes.*

*Mima Queen and child v. Hepburne* 7 *Cranch* 290.

*Price v. The Earl of Torrington* 1 *Smith's Lead. Cas.* (6*th Am. Ed. Hare & Wallace's notes*) *top p.* 506 *and* 508.

*Walter v. Ballman,* 8 *Watts* 544.

*Kent v. Garvin,* 1 *Gray* (*Mass.*) 148.

*Wilbur v. Seldon* 6 *Cowen* 162.

*Merrill v. The Ithica & O. R. R. Co.,* 16 *Wend.* 595.

*Brewster v. Doane,* 2 *Hill* 537.

*Moore v. Andrews,* 5 *Porter* 107.

*McLaughlin v. Universal Ins. Co.* 1 *Peters* 183.

*Church v. Hubbart,* 2 *Cranch* 187.

In an action *ex-contractu* against several, the plaintiff, at common law must prove a joint contract or liability.

1 *Chitty Pl.* 44, and cases cited.

*Barbour on Parties, p.* 308, and cases cited in note.

*Wolcott v. Canfield,* 3 Conn. 198.

*Livingston v. Tremper,* 11 *Johnson's R.* 101.

*Monahan v. Gibbons,* 19 *John.* 112.

2 *Greenleaf, on Ev.* 483 (10*th Ed. by Redfield.*)
2 *Saunder's Pl. & Ev.* (5*th, Am. Ed.*) 582.
*Petrie v. Newell,* 13 *Ill.* 647.
*Hurd v. Curlie,* 18 *Ill.* 188.
1 *Saunders, Pl. and Ev.* (5*th Am. Ed.*) 236.
*Halliday v. McDougall,* 20 *Wend.* 81.
*Springer v. Peterson,* 1 *Blackford* 188.

An Illinois statute relating to practice, passed in 1841, does not regulate the practice in the United States courts in Illinois

4 *U. S. Stat. at large* 278.
3 *Id.* 536.

The Illinois statute dispensing with proof of joint liability or partnership of defendants does not apply in this case. When defendants are sued as partners they should be described as such in the declaration. That was not done in this case. To count against the defendants as joint obligators the declaration must be upon an obligation under seal, and if they are declared against as joint payors the count must be upon a simple instrument in which there is an express promise to pay.

(Record pages 5 and 6.)
*Petrie v. Newell,* 13 *Ills.* 649.
*Neteler impleaded, &c. v. Curtus* 18 *Ills.* 188.
*Woodworth v. Fuller,* 24 *Ills.* 109.
*Brent v. Shorks,* 36 *Ills.* 125.
*Vol. 2 pt. 2, Saunders Pl. and Ev.* (5*th Am. Ed.*) ~~518~~ 576; (5*th Am. Ed., p.* 1148) of Vol 1
1 *Chitty Pl.* 204.
1 *Tidd, Pr.* 13.
Johnson v Burell 2 6 Ills 66

*Henshall v. Roberts*, 5 *East*, 150.
*Murritt v. Scammon*, 2 *Selden* 171.
*Woodford v. Webster*, 3 *Day* (*Conn.*) 472.

The laws of Illinois on the subject of interest, are binding on the United States courts in Illlinois, and no interest was recoverable in this suit by the laws of Illinois.

1 *U. S. Stat. at large* ~~91.~~ 92.
*Shelly v. Gray*, 11 *Wheat.* 361.
*Sneed v. Wister*, 8 *Wheat.* 690.
*Barrow v. Bert*, 9 *How.* 366.
*Webster v. Cooper*, 14 *How.* 504.
2 *Saunders on Pl. and Ev.* 251.
2 *Tidd, Pr.* 871-2.
1 *Chitty on Contracts*, ~~600.~~ 580
*Madison v. Bartlett*, 1 *Scam.* 67.
*Sammis v. Clark*, 13 *Ill.* 544.
*Hitt v. Allen*, 13 *Ill.* 592.
*Clement v. McConnell*, 14 *Ill.* 154.
*McCormick v. Elston*, 16 *Ill.* 204.
*Kennedy v. Gibbs*, 15 *Ill.* 406.
*Davis v. Krurge*, 51 *Ill.* 170.
*Aldrich v. Dunham*, 16 *Ill.* 403.

# BRIEF AND ARGUMENT.

## FIRST AND SECOND ERRORS ASSIGNED.

The first and second errors assigned will be considered together. They are as follows:

I.

The Court erred in overruling the objection of the defendants, below, to the reading to the jury of the following portion of the deposition of the witness, John W. White, to-wit: (see record pages 24 and 26.)

"On January 26, 1870, received 1 plate, weight, 276 pounds; January 29, received two shipments, one consisting of 92 plates, weight, 20,350 pounds, and one shipment of 64 plates, weight, 13,154 pounds. On the 14th day of February, 1870, we received one plate of iron, weight, 244 pounds."

II.

The Court erred in overruling the motion of defendants, below, to strike out and exclude from the jury that portion of the deposition of the witness, John W. White, which is as follows, to-wit: [Record, page 24].

"On January 26, 1870, received one plate, weight, 276 pounds; January 29, received two shipments, one consisting of 92 plates, weight, 13,154 pounds, and one shipment of 64 plates, weight, 20,350 pounds. On the 14th of February, 1870, we received 1 plate of iron, weight, 244 pounds."

One of the fundamental principles of the law of evidence is—that the *best evidence* of which the case in its nature is susceptible must always be given. 1 Greenleaf on Ev. (12th ed. by Redfield), § 82. 1 Phillips on Ev. (5th Am. Ed., Cowan & Hill's & Edward's Notes), top p. 469 & notes.

*Mima Queen & Child vs. Hepburn*, 7 Cranch 290.

The evidence objected to, we submit, is *two* degrees removed from the best evidence the nature of the case is susceptible of.

(1) The *best* evidence of these facts—if they are such—which the plaintiffs sought to establish by this evidence, is the sworn testimony of some witness who knows the same of his own knowledge.

On pages 24 and 25 of record (page 3 ~~*ante*~~) this witness White testifies as follows:—

"*Cross Interrogatory.* Have you a distinct recollection of the transaction about which you have testified, or do you receive any assistance in making your statements from any written memorandum?

*Answer.* I have a personal recollection of C. & G. Cooper & Co. getting plates of iron, *but the dates of receiving, and the time of delivering to them, and the weights of the iron, I derive from papers and books.*

*Cross Interrogatory.* If you have referred at any time to any writing or memorandum to assist you in testifying in this case, please say so.

*Answer.* I have referred to written memorandum to assist me in giving my testimony in this case.

*Cross Interrogatory.* Do you have a distinct recollec-

tion of the facts you have stated without reference to any such memorandum, or do you rely *wholly* upon such memorandum in making such statements ?

*Answer.* I have a distinct recollection of the iron being received at the depot, and of the same being delivered to the teamsters of C. & G. Cooper & Co., *but the time of receiving, and the date of delivery to the teamsters, and the weights of the iron, I derive from papers and books.*"

As the question put to witness is whether he relied "*wholly* upon such memorandum in making the said statements," it follows that the answer is an admission that he relied *wholly* upon "papers and books" in making the statements he did relative to the time of receiving, the date of delivery and the weight of the iron.

Certainly he had no knowledge of its weight, as he expressly says he did not weigh it (Record, page 25), nor did he count the plates of iron (Record, p. 25). There was *some* witness who could testify to these matters of his own knowledge. For if the iron was weighed (the only way its weight could be ascertained) *someone* weighed it. And on page 25 of record the witness White says: "I have sometimes *assisted* in the handling of freights, but it is mostly done by *others* in the employ of the company under *our* directions."

Now why was not the testimony of these witnesses who weighed and handled the iron produced or some excuse given therefor ?

It does not appear that any effort was made to get their evidence—indeed, for aught that was shown, these witnesses may have been, before and at the time of the trial, to the knowledge of the defendants, within the city

of Chicago, ready to appear and testify, if requested; or if they were in Ohio, or any other state, their testimony could have been taken by deposition. The judicial act of 1789, as well as the act of January 24th, 1827, gave the plaintiffs power to *compel* these witnesses to appear and testify before a commissioner, anywhere in the United States. Conklin's U. S. Treatise (5th ed.), p. 414 and 418.

(2) In the absence of the testimony of some one who could testify to these matters, of his own knowledge, the next best evidence would have been the production of "the papers and books" referred to by the witness White, and upon which he admits he *wholly relies* in making his statements of these matters (page ante p. 25 of record).

But even before these "papers and books" could be received as evidence there would have to be some further proof that the entries in these "papers and books" were made by some one in the usual and regular course of his business. Greenleaf on Ev., § 116.

Contemporaneous with the facts—*Price* v. *The Earl of Torrington*, 1 Smith, lead case, (6th Am. ed. Hare & Wallace's notes) to pp. 508; 1 Greenleaf on Ev. (12th ed., by Redfield), § 115 and 116, p. 139, and cases cited in note.

*Walter* v. *Ballman*, 8 Watts, 544.

Who had the means of personally knowing at the time he made the entries of the truthfulness of the facts, which he so records.

*Kent* v. *Garvin*, 1 Gray (Mass.) 148.

And the entries must be *original*, and not transcribed entries.

*Kent* v. *Garvin*, 1 Gray (Mass.), 148.

And the party who made them must, if living, authenticate the same by his oath.

*Price* v. *Earl of Terrington*, 1 Smith Lead cases, (6th Am. ed., by Hare & Wallace), top p. 506.

*Wilbur* v. *Selden*, 6 Cowen 162.

*Merrill U. S.* v. *The Ithaca & Oswego R. R. Co.*, 16 Wendall, 595, *et seq.*

*Brewster* v. *Doane*, 2 Hill 537.

*Kent* v. *Garvin*, 1 Gray (Mass.) 148.

His absence from the state or jurisdiction of the court does not dispense with the requirement that he should authenticate the entries by his oath.

*Price* v. *The Earl of Terrington*, 1 Smith's Lead cases (Hare & Wallace's 16th Am. ed.), top p. 506.

*Wilbur* v. *Selden*, 6 Cowen 162.

*Merrill* v. *The Ithica & Oswego R. R. Co.* (16th Wendall 595.

*Brewster* v. *Doane*, 2 Hill 537.

*Moore* v. *Andrews*, 5 Porter 107.

But as the U. S. courts have power to compel the attendance of witnesses before a commissioner anywhere in the United States, a witness could not be said to be beyond the jurisdiction of the court while in another state.

The evidence fails to show that these "papers and books" were made or kept by the witness, and the presumption is certainly not very strong in favor of it, as he speaks of himself as "an agent" of the company in one place and in another he speaks of the handling of the freights being "mostly done by others in the employ of the company

under *our* directions; and in another place he says he did not weigh the iron. (Record p. 24 and 25, *ante* p. 5.)

The evidence also fails to show that the papers and books were papers and books of original entries; or were kept by any one in the regular course of his or her business, or by any one who had personal knowledge of the facts, or contemporaneous with the facts, or were they authenticated by the oath of the party making them, and yet the plaintiffs, although not entitled to introduce in evidence, for these reasons—the papers and books themselves—are permitted to introduce paral testimony of their contents!!

On what principle of law this evidence was admissable we cannot see.

It certainly did not come within the provisions of the Illinois statute then in force authorizing the introduction of secondary evidence of the contents of the papers and books, etc., of a corporation—that statute is as follows: "Copies of all papers, books or proceedings, or parts thereof appertaining to the transactions of any railroad company, banking association or other corporation certified to be true copies by the clerk, secretary, cashier or other keeper of the same, under the seal of such company, bank or corporation, or under the private seal of such clerk, secretary, cashier, or other keeper of the same if there be no seal in such company, bank or corporation—the said clerk, secretary, cashier, or keeper also certifying that he is entrusted with the safe keeping of the original of which he gives certified copies—with an affidavit of the truth of such certificate taken before some officer authorized to administer oaths being annexed thereto, shall be received as *prima facie* evidence of the facts so certified in all the courts of this State in any suit or proceeding pending

before them. Sec. 1 of the Act of 1853, Gross' Statutes of Illinois, Ed. of 1871, p. 270, Sec. 14.

This evidence that was admitted against the defendants' objection was material and pertenant to the issue in this case. The plaintiffs offered it "to maintain the issue on their part," which was that they in fulfilment of the agreement between the parties did deliver to the defendants "four of the said bills of iron in question, *at Mt. Vernon, Ohio.*"

If there had been no agreement between the parties in relation to the iron being delivered to the defendants "*at* Mount Vernon, Ohio" (see copy of plaintiffs' account filed with their declaration, page of the record), and the defendants had simply directed the plaintiffs to send them certain goods, then unquestionably the delivery by the plaintiffs of the goods to the usual common carrier, directed to the defendants, would be a good delivery to them.

But in this case the plaintiffs were to deliver the goods to the defendants "*at* Mount Vernon, Ohio." And besides the plaintiffs themselves show that they did not direct the goods to the defendants C. & G. Cooper & Co., but by mistake directed the goods to another firm—C. & J. Cooper & Co.

However, whether there was enough other testimony before the jury to authorize them to find a verdict the way they did or not is immaterial.

This court has said in a similar case, "it is to be considered that these points do not come before this court upon a motion for a new trial, addressing itself to the sound discretion of the court.

"In such cases the whole evidence is examined with "minute care and the inferences which the jury might "properly draw from it are adopted by the court itself. If, "therefore, upon the whole case, justice has been done be- "tween the parties, and the verdict is substantially right, "no new trial will be granted, although there may have "been some mistakes committed at the trial. The reason "is that the application is not a matter of absolute right in "the party, but rests in the judgment of the court and is to "be granted only when it is in furtherance of substantial "justice.

"The case is far different upon a writ of error bringing "the proceedings at the trial by a bill of exceptions to the "cognizance of the appellate court.

"The directions of the court must then stand or fall "upon their own intrinsic propriety as matters of law." *McLanaghan et al.* v. *The Universal Insurance Company*, 1 Peters' Rep., on page 183, per Story J.

And again in *Church* v. *Hubbart*, 2 Cranch's Rep., 187, (on page 177 of the 3d ed.) this court says: "If the court "erred in admitting as testimony papers which ought not "to have been received, the judgment is of course to be "reversed and a new trial awarded. It is urged that there "is enough in the record to induce a jury to find a verdict "for the defendants independent of the testimony objected "to, and that saying what judgment the court below ought "to have rendered, a direction to that effect might be given. "If this was even true in point of fact the inference is "not correctly drawn. There must be a new trial, and at "that new trial each party is at liberty to produce new evi- "dence—of consequence this court can give no instructions "respecting that evidence."

This rule is very just and reasonable, for if it is a sufficient reply to the urging of an error of the court below in admitting improper evidence to say the jury *might* properly have found a verdict against you even without considering the improper testimony, then the judgment of the appellate court is substituted for the judgment of the jury—and a party is thereby deprived of his constitutional right to have his cause tried by a jury of his peers, and *their* judgment obtained, whether the facts proven are sufficient under the law, to authorize them to find the issue against him. We submit a party is not bound to proceed any further with his case after the court has committed an error. He can stop right there and then and ask the judge to sign his exception, and if judgment goes against him rely upon that error to reverse the same. And how can this court say that the defendants in this case did not have sufficient legal evidence in their possession to overthrow and counterbalance all the legal evidence introduced by the plaintiffs but did not care to introduce it, and thus disclose their case after the court had admitted what they deemed improper testimony, but determined to abide by their exception.

As well might it be said to a defendant who elected to abide by one of his special pleas after the court below had sustained a demurrer to it, "the evidence introduced in the case clearly shows that even though your plea may be good in law, the court erred in sustaining a demurrer to it. Yet the facts will not support it. You would have got beaten just the same. You were not injured by the error of the court."

And, besides, after what this court has said in Lincoln v. Claflin, 7 Wallace's Rep. 196–7, and in several cases prior

to that, it was not deemed proper in preparing the Bill of Exceptions to incorporate in it all the evidence *pro* and *con* which bore upon the materiality of this testimony, which was objected to; hence this court has not the same facilities as the jury had. And if the advice contained in Lincoln v. Claflin is followed, it never can have the same facilities as the jury of judging whether there was enough testimony introduced by the plaintiffs, outside of that objected to, to entitle them to recover.

We shall dismiss the point made by the objection to this evidence by simply quoting a sentence from the opinion of Chief Justice Marshall, delivered in the case of Mima Queen and child vs. Hepburn: (7 Cranch's Rep., p. 295.)

"It was very justly observed by a great Judge that all questions upon the rules of evidence are of vast importance "to all orders and degrees of men; our lives, our liberty, "and our property are all concerned in the support of these "rules which have been matured by the wisdom of ages, "and are now revered from their antiquity and the good "sense in which they are founded. One of these rules is "that *hearsay* evidence is in its own nature inadmissible. "That this species of testimony supposes some better testimony which might be adduced in the particular case is not "the sole ground of its exclusion, its intrinsic weakness, its "incompetency to satisfy the mind of the existence of the "fact, and the frauds which might be practiced under its "cover combined to support the rule that hearsay evidence is totally inadmissable."

3RD AND 4TH ERRORS ASSIGNED.

The third and fourth errors raise the same points, and will be considered together. They are as follows:

(3d.) "The Court erred in refusing to instruct the jury,

"as it was prayed by the defendants, that it was necessary "for the plaintiffs in this case to prove the partnership or "joint liability of the defendants before they were entitled "to recover."

(4th.) "The Court erred in instructing the jury that it "is not necessary for the plaintiffs in this suit to prove the "partnership or joint liability of the defendants because "such proof is rendered unnecessary by the statute of the "State of Illinois, there being no issue calling for such "proof."

This was a suit in assumpsit, and the declaration filed by the plaintiffs begins as follows:

"UNITED STATES OF AMERICA."

"CIRCUIT COURT OF THE UNITED STATES."

"For the Seventh Circuit and Northern District of Illinois."

"OF THE JULY TERM, A. D., 1870."

"Northern District of Illinois, ss:"

"Charles E. Coates, George W. P. Coates and J. Pen- "nock Coates, co-partners, trading as Coates & Brothers, "plaintiffs in this suit, who are citizens of the State of "Maryland, by Hutchinson & Luff, their attorneys, com- "plain of Charles Cooper, George Rogers, C. Gray Cooper "and Julius C. Debis, who are citizens of the State of "Ohio, and Frank L. Fairchild, who is a citizen of the State "of Illinois, co-partners, doing business as C. & G. Cooper "& Co., defendants, who were summoned, etc., of a plea "of trespass on the case upon promises."

"For that, whereas the said defendants on, to-wit: the "first day of May, in the year of our Lord, one thousand "eight hundred and seventy, at Baltimore, to-wit: at "Chicago, in the district aforesaid, were indebted to the

"plaintiffs in the sum of five thousand dollars," etc., etc.

And throughout the balance of the declaration the parties are simply referred to as "plaintiffs" and "defendants," without any addition of "*as co-partners* as aforesaid," or, indeed, any intimation whatever that the parties were *co-partners* when the considerations were received and the promises made, described in the different counts.

To this declaration the defendants plead the general issue.

IN AN ACTION, EX-CONTRACTU AGAINST SEVERAL, THE PLAINTIFF AT COMMON LAW MUST PROVE A JOINT CONTRACT OR LIABILITY.

1st. Chitty on Pleading, 44; and cases cited. Barbour on Parties, p. 308, and cases cited in note. Wolcott v. Canfield, 3 Conn. 198; Livingston v. Tremper, 11 Johnson's R, 101; Manahan v. Gibbons, 19, Johnson's R, 112.

"It is essential in an action, *ex-contractu* against partners, "that the evidence of partnership should extend to all the "defendants, otherwise the plaintiff will be non-suited," 2d Greenleaf on Ev. (10 Ed. by Redfield), § 83, and cases cited.

"In actions against several, as partners, the plaintiff "must prove that all the defendants were jointly interested "in the demand on which the action is founded, *at the time* "*it occurred*." 2d Saunders on Pleading and Evidence, (5th Am. Ed.), 582.

Where non-assumpsit is pleaded in a suit against several defendants, the plaintiff must prove the partnership or joint liability of the defendants before he can recover.

Petrie et al. v. Newell, 13 Ills., R. 647.

Hurd et al. v. Culies et al., 18 Ills., 188, and cases cited in opinion, 1 Saunders on Plead. & Evi. (5 Am. Ed.), 236.

Holliday v. McDougall et al., 20 Wendell, R. 81, Spring et al. vs. Peterson et al., 1 Blackfords, R. 188.

Whilst it is admitted that the position contended for by the defendants below would be correct *at Common Law*, it is insisted that the statute of the State of Illinois enacted February 17, 1841, which declares that "in actions upon "contracts express or implied against two or more defend- "ants, as partners, or joint obligors, or payors, proof of the "joint liability or partnership of defendants or their Chris- "tian or surnames, shall not in the first instance be required "to entitle the plaintiff to judgment, unless such proof shall "be rendered necessary by pleading in abatement or the "filing of pleas denying the execution of such writing ver- "ified by affidavit," etc. (Vide. Warren vs. Chambers et al., 12 Ills., R. 126,) is applicable to the case, and dispenses with the proof called for.

In reply to this we submit: *First*, That this law does not apply to the practice in th eU. S. Courts in Illinois.

By the Act of May 19, 1829, Sec. 1, (4 U. S. Statutes at Large, 278,) it is enacted that "the form of mesne process, "except the style and the forms and modes of proceeding "in the Courts of the United States held in those States "admitted into the Union since the 29th day of September "in the year 1789 (Illinois was admitted December 3d, "1818, *vide.* 3 Stat. at Large, 536.) in those of Common "Law shall be the same in each of the said States respect- "ively, as are *now* used in the highest Court of Original and "General Jurisdiction of the same, subject, however, to "such alterations and additions as the Courts of the United "States respectively shall in their discretion deem expedi- "ent, or to such regulations as the Supreme Court of the "United States shall think proper, and from time to time "by rules prescribe to any Circuit or District Court "concerning the same."

This Act of the Illinois Legislature relating to the practice in the Courts of that State has not been adopted by any *Rule* of the U. S. Circuit Court for the Northern District of Illinois.

*Second*, If this Act *is* applicable to the U. S. Circuit Court for the Northern District of Illinois, still we contend it does not help the matter any.

That Act is expressly limited to actions "against two or "more defendants *as partners or joint obligors or payors.*"

And the Supreme Court of Illinois, in construing the Act, say, "*When they are sued as partners they should be* "DESCRIBED AS SUCH *in the declaration.* * * * "*To count against the defendants as joint obligors, the* "*declaartion must be upon an obligation under seal, and if* "*they are declared against as joint payors, the count must* "*be upon a simple instrument in which there is an express* "*promise to pay.*"

Petrie et al. vs. Newell, 13 Ills., Rep. 649.

The mere fact that the plaintiffs have in the commencement of their declaration added to the names of the defendants the words "co-partners doing business as C. & G. Cooper & Co.," does not amount to an averment that they contracted or promised as partners.

(1.) It might be true that these defendants were, at the time of the bringing of this suit, actually co-partners doing business under the name of C. & G. Cooper & Co., but *non constat* that they *as co-partners* contracted or became liable for this indebtedness set up in the various counts of the declaration.

(2.) The declaration avers an indebtedness to have

accrued to the plaintiffs *May first A. D. 1870*, but it is not averred that they were co-partners *then* even in the commencement.

(3.) And we insist that this addition to their names cannot by any principle of pleading be considered a *legal averment* that the defendants *were* co-partners when the suit was brought. It is mere surplusage, or *descriptio personarum*, and has been so held by the Supreme Court of Illinois in a similar case arising under this same statute. *Vide Johnson, impleaded &c., vs. Buell, et al.*, 26 Ills. Rep., 66. On page 68 the court say "the declaration complains of W. B. Johnson and A. Garrison, 'partners,' etc., for that they 'made their certain promissory note in writing,' etc., 'and then and there delivered 'the same,' etc., the word '*partners*,' etc., is a mere "description of their persons and has nothing to do with "the character in which they executed the note. It is not "*averred* that they did this act as partners."

*Vide* also *Neteler impleaded with Hurd vs. Curtis, et al.*, 18 Ill. Rep., 188. (*Woodworth vs. Fuller*, 24 Ill., 109, construing a similar statute relating to plaintiffs.) *Brent vs. Shooks*, 36, Illinois, Rep. 125.

Vol. 2, part 2, Saunders Pleading & Evidence (5th Am. Ed.), 576.

"In every count stating a debt or promise to the "executor or administrator in that character, the word 'as' "executor, &c., must be inserted. It is not enough to say "that it accrue to him, 'executor,' or 'being executor as "'aforesaid,' but it must be averred that it accrued to him "'*as* executor.'" 1 Chitty on Pleading, 204, and cases cited in note. To same effect see 1 Saunders on Pleading

and Evidence, 1168; 1 Tidd's Practice, 13. When, in the commencement, after the plaintiff's name is added "executor of the last will and testament of A— B—, deceased plaintiff in this suit," etc., and then a cause of action is stated as accruing to the "plaintiff," it is held the "executor," &c., is mere *descriptio personae*, and the suit is considered in his individual right. *Henshall v. Roberts*, 5 East, 150, per Lord Ellenborough. In *Merritt v. Seamon*, 2 Selden (6 N. Y.), p. 172, the Court of Appeals of N. Y. say on this question: "This mode of describing the plaintiff "as executor is, upon all the authorities, to be regarded as "merely a *descriptio personae* in no respect changing the "character of the pleadings or the rights of the parties "under them. In Chitty on Pleadings (1 Chitty Pl., 251-"2), when the learned author is treating of the necessity "of the declaration agreeing with the process in the "character in which the parties sue or are sued, he says, "'though the process had described the plaintiff or "'defendant as being executor, administrator, etc., the "'plaintiff might declare generally in his own right, treat-"'ing the description as a mere surpfluous addition, just as "'if the word co-partner had been idly introduced.'"

"In *Delafield v. Kinny*, President of the Erie County "Bank (27 Wend, 345), it was held that a suit against an "association under the General Banking Law, may be "brought against it either in the name of the association or "in that name with the addition of the name of the presi-"dent thereof—but the *contract must* be stated as having "been made by or with the bank in its corporate name."

"In *Hunt v. Van Atstyle* and others (25 Wend, 605), it "was decided that an action on a bill of exchange in the "name of an individual describing himself *as president of* "*a banking association* was a suit in the plaintiffs' indivi-"dual character.

"Justice Crown says in his opinion 'the declaration is "one by the plaintiff Hunt, in his own right. Calling him-"self president of a certain company is a mere *descriptio* "*personæ*. He does not declare as president of a company "created under the General Banking Law.'

"In the *Ogdensburg Bank v. Van Rensselaer*, president "of the St. Lawrence Bank (6 Hill, 240), the same prin-"ciple was again declared. Bronson J. saying: 'This is "an action against Henry Van Rensselaer, and the words "which follow his name, *President of the St. Lawrence* "*Bank* can only be regarded as a *descriptio personæ*. The "question was decided in Delafield against Kinney. It was "also decided at the last term on the argument of a cause "where the declaration was framed in the same way against "an executor, and is decided by all the precedents in the "books—when one is sued in *autre droit*. The promises "should have been alleged as made by the bank, and the "breach should have been that the *bank* had not paid.'"

See also to the same effect the following authorities:

*Christopher v. Stockholm*, Wend. Rep. 30.
*Brent v. Shook*, 36 Ills., Rep. 125.
*Woodford v. Webster*, 3 Day (Conn.), 472.

5TH ERROR ASSIGNED.

The fifth error assigned is as follows: "The court erred "in instructing the jury that they should, if they found for "the plaintiffs, allow interest in their estimate of damages "on the accounts from the date of the receipt by the de-"fendants of the last item, at the rate of six per cent per "annum."

This was a suit to recover the price of several bills of iron which the plaintiffs claimed they had sold and deliv-ered to the defendants. On pages 27 and 28 the record

states: "There was no evidence introduced of any express "contract, promise or agreement on the part of the de- "fendants to pay any interest on the bills, or account, or "of any custom or usage of trade authorizing the plaintiffs "to charge interest, nor was there any evidence that the "account sued upon had ever been adjusted by the defend- "ants or even presented to them. There was no evidence, "however, that the iron in question had been sold upon "credit. The only evidence in regard to the non-payment "of the account sued upon was that the plaintiffs at Balti- "more, Maryland, had, shortly after they shipped the iron "in question, drawn a draft, or drafts, on the defendants at "Mount Vernon, Ohio, which drafts had been returned to "them for non-acceptance."

The general rule of the common law is that *interest* is not recoverable unless there is an express stipulation that interest should be paid, except such be the usage of trade.

2 Saunders on pleading and evidence, 251, and cases cited; 2 Tidd's practice, 871-2; 1 Chitty on contracts, (7th English Ed.) 666 and cases cited; Madison vs. Bartlett, 1 Scammon, 67; Sammis vs. Clark, 13 Ills., 544; Hitt vs. Allen, 13 Ills., R. 592 on p. 596.

But in Illinois the whole subject of interest is regulated by statute.

Section 2, Chapter 54, Rev. Stat. (Gross, Statutes, 3d Ed) p. 370; Scates Statutes, p. 599; Purples Statutes p. 633, declares, "Creditors shall be allowed to receive at the rate "of six per centum per annum for all moneys after they "become due on any bond, bill, promissory note, or other "instrument of writing, on any judgment recovered before "any court, or magistrate, authorized to enter up the same

"within this State, from the day of signing until the effects "are sold, or satisfaction of such judgment be made. Like- "wise on money lent or money due on the settlement of "accounts from the day of liquidating accounts between "the parties and ascertaining the balance; on money re- "ceived to the use of another and retained without the "owner's knowledge, and on money withheld by an unrea- "sonable and vexatious delay."

This law has been in force in Illinois over fifty years. It was first enacted March 2, 1819 (*vide* Gale's Statute of Ills., p. 344), and has received a settled construction by the State courts in a series of decisions.

In *Sammis vs. Clark et. al.* (13 Ills. Rep., p. 544), this statute first came up for construction by the Supreme Court of Illinois, and the court in that case, which was for goods sold, say (page 546), after citing the statute: "It is "a rule in the construction of statutes that the expression "of one thing is the exclusion of another, and it may well "be insisted, when the legislature has enumerated a variety "of cases in which creditors shall be allowed to receive "interest, that it was not their intention to permit them to "demand it in the cases not enumerated. Darrise on "Statutes, 713. *The King vs. Cunningham*, 5 East., 478. "*The Warden of St. Paul vs. the Dean*, 4 Price, 78."

"Interest is not given by the common law for a failure "to pay money when it is due unless the parties have so "agreed. Hawkins' Bk. 1, ch. 29, § 6. *Renn's Glass* "*Factory vs. Reid*, 5 Cowen's R., 608."

"It follows from these positions that interest can only "be recovered in this State in actions purely *ex contractu*, "and where there is nothing tortuous in the character of "the indebtedness in the cases specified in the statute, or

"where there has been an express promise to pay interest, "or such a promise can be inferred from the circumstances, "the particular mode of dealing adopted by the parties, or "the usage of the trade in which they dealt."

"In this case the claim of the plaintiff is on an open "account, and it is manifest they are not entitled to interest "under the statute unless it be under that clause which "allows interest on money withheld by an unreasonable "and vexatious delay of payment."

"No fixed rule can be laid down by which to determine "in every case what shall constitute such an unreasonable "and vexatious delay of payment as will entitle the cred- "itor to interest. This is a question which must necessari- "ly be determined to a great extent upon the circum- "stances of each particular case as it arises; but it is clear "that there must be something more than mere delay to "authorize a recovery of interest under this clause of the "statute. The delay of payment must have been both un- "reasonable and vexatious. That is, the debtor must in "some way have thrown obstacles in the way of the col- "lection of the demand, or by some circumvention, contri- "vance or management of his own have induced the cred- "itor to prolong the time of proceeding against him longer "than he would otherwise have done. In this case no cir- "cumstances appear tending to show that there was any- "thing vexatious in the delay of payment. And the sim- "ple forbearance of the plaintiffs to proceed in the collec- "tion of their debt, from 1845 to 1848, does not show any- "thing vexatious on the part of the defendant, or such a "case as will of itself entitle the plaintiffs to interest."

This construction of the statute has been followed in numerous decisions, *vide* Hitt v. Allen, 13 Ill. Rep., 593, on pages 595–6; Clement v. McConnell, 14 Ill. Rep., 154; McCormick v. Elston et al. 16 Ills. Rep., 204; Ken-

nedy v. Gibbs et al. 15 Ills. Rep., et al. 406. In this case the court say: "It would be the pro- "vince of *the jury* to determine whether payment had "been unreasonably and vexatiously withheld." And to the same effect is Davis v. Kenaga, 51 Ills. Rep., 170. In Aldrich et al. v. Dunham et al. 16 Ills. Rep. 403, the court decide that: "To appear and defend a suit is a right which "cannot be construed into unreasonable and vexatious de- "lay of payment."

By section 3 of the act of 24th Sept. 1789 (Vol. 1, Statutes at Large, p. 92.) it is provided that "the laws of the "several States, except where the constitution, treatise, or "statutes of the United States shall otherwise require or "provide, shall be regarded as rules of decision in trials at "common law in the courts of the United States where "they apply."

And this applies to the laws of the several states in relation to *interest*.

*Sneed v. Wister*, 8 Wheaton, Rep. 690.
*Burrow v. Neal*, 9 Howard, 366.

"And it has often been held that the settled construction "of a state statute by its Supreme Court is considered as a "part of the statute, and the statute as thus expounded is "regarded as a rule of decision in the courts of the United "States where it applies"—per Justice McLean in *Mas- "singill v. Dorons*, 7 Howard, 767, to the same effect vide "*Nesmith v. Sheldon*, 7 Howard, 812.

*Van Rensselear v. Kearney et al.*, 11 Howard, 297.
*Green v. Lessees of Neal*, 6 Peters, 291.
*Webster v. Cooper*, 14 Howard, on p. 504.
*McKeen v. Delancy's* lessee, 5 Cranch, 22.
*Polk's Lessee v. Wendall*, 9 Cranch, 87.
*Gardiner v. Collins*, 2 Peters, 58.
*Shelby v. Guy*, 11 Wheaton, 361.

Respectfully submitted
S. M. Packard
atty. for pffs in Error

No. _____ Agenda _____

# SUPREME COURT OF THE UNITED STATES.

## DECEMBER TERM, 1872.

CHARLES COOPER,
GEORGE ROGERS,
C. GRAY COOPER,
JULIUS C. DEBIS, AND
FRANK L. FAIRCHILD,
*Plaintiffs in Error,*
*vs.*
CHARLES E. COATES,
GEORGE W. P. COATES,
AND J. PENNOCK COATES,
*Defendants in Error.*

*In Error to the Circuit Court of the United States for the Northern District of Illinois.*

# BRIEF & ARGUMENT

**FOR PLAINTIFFS IN ERROR.**

Filed _____ 1874.

_____

*Clerk.*

S. W. PACKARD,
*Attorney for Plaintiffs in Error.*

# UNITED STATES SUPREME COURT.

DECEMBER TERM, A. D. 1872.

CHARLES COOPER, *et al.*, *Plaintiffs in Error*,

*v.*

CHARLES E. COATES, *et al.*, *Defendants in Error.*

## BRIEF FOR DEFENDANTS IN ERROR.

O. K. A. HUTCHINSON,

ATTORNEY FOR DEFENDANTS IN ERROR.

CHICAGO:

BULLETIN PRINTING COMPANY, 132, 134 AND 136 MONROE STREET, CORNER CLARK.

1874.

# Supreme Court of the United States.

DECEMBER TERM, A. D. 1872.

CHARLES COOPER, GEORGE ROGERS, C. GRAY COOPER, JULIUS C. DEBIS, and FRANK L. FAIRCHILD,
*Plaintiffs in Error,*

*v.*

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*Defendants in Error.*

*In Error to the Circuit Court of the United States for the Northern District of Illinois.*

## BRIEF FOR DEFENDANTS IN ERROR.

This was an action of assumpsit brought by defendants in error against plaintiffs in error.

The declaration states that defendants in error, "co-partners trading as Coates & Brothers," complain of defendants in error, "co-partners doing business as C. & G. Cooper & Co.," and contains the ordinary common counts. Printed R. p. 6.

The plea is the general issue. Printed R. p. 6.

### I.

The rules of evidence prescribed by the statute of a State

are always followed by the courts of the United States sitting in the State.

*Sims v. Hundley*, 6 How. 1.

II.

A judicial interpretation by the highest court in the State of one of its own statutes will be adopted by this court.

*Elmendorf v. Taylor*, 10 Wheat. 152.

*McCutchen v. Marshall*, 8. Pet. 220.

III.

It was not necessary, in this case, for plaintiffs below to prove that they were partners or joint payees.

Statutes of Illinois, by Gross, Vol. 1, p. 270, § 11, which is as follows: "In trials of actions upon contracts, express or implied, where the action is brought by partners, or by joint payees or obligees, it shall not be necessary for the plaintiff, in order to maintain any such action, to prove the co-partnership of the individuals named in such action, or to prove the christian or surnames of such partners, or joint payees or obligees; but the names of such co-partners, joint payees or obligees, shall be presumed to be set forth in the declaration, petition or bill: *Provided*, that nothing herein contained shall prevent the defendant in any such action from pleading in abatement, as heretofore, or proving on the trial, either that more persons ought to have been plaintiffs, or that more persons have been made plaintiffs than have a legal right to sue, or that the christian or surname is other and different from the one stated in the declaration, petition or bill; in which event the defendants' rights shall be as at common law."

*Heintz v. Cahn*, 29 Ill. 308.

## IV.

It was not necessary, in this case, for the plaintiffs below, to prove the partnership or joint liability of the defendants.

Statutes of Illinois by Gross, Vol. 1, p. 270, § 12, which is as follows: "In actions upon contracts, express or implied, against two or more defendants, alleged to have been made or executed by such defendants as partners or joint obligors or payors, proof of the joint liability or partnership of the defendants, or their christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or the filing of pleas denying the execution of such writing, verified by affidavit, as required by law."

*Warren v. Chambers*, 12 Ill. 124.
*Stillson v. Hill*, 18 Ill. 262.
*McKinney v. Peck*, 28 Ill. 174.

The case of *Warren v. Chambers*, above cited, is very similar to the present. The declaration was against defendants, as partners, and contained only the common counts, for money paid. The plea was the general issue verified. The court below decided that the plea put the partnership in issue, and, upon verdict, rendered judgment for the defendants.

The judgment was reversed, the court saying:

"In all cases, except where the foundation of the action is an instrument of writing, the execution of which is denied by plea verified by affidavit, whether the action be upon contract express or implied, in writing, or by parol, defendants who are sued as partners can only put in issue that fact by filing a plea in abatement, especially denying the partnership or joint liability.

In this case no such plea was filed, consequently all the evidence upon the subject of the partnership of the defendants was improperly admitted, as no such question was in issue."

In *Stillson v. Hill*, cited above, the court below refused to instruct the jury that the plea in abatement was not waived by the plea of the general issue; for which error the judgment was reversed.

The court, referring to the construction of the statute in the case last referred to, say: "It therefore follows from this construction of the statute, that a defendant sued jointly with another as co-partners, is compelled to plead in abatement, denying the partnership, to avoid the legal admission of his joint liability. If he pleads in bar, he admits the partnership."

To the same effect is *Shufeldt v. Seymour*, 21 Ill. 524.

The latest case is *McKinney v. Peck*, 28 Ill. 174, in which the construction of the statute in *Warren v. Chambers*, 12 Ill. 124, is expressly re-affirmed.

The only case decided in Illinois which has the appearance of sustaining a different construction of this section of the statute is *Johnson v. Buell*, 26 Ill. 66. The declaration complains "of W. B. Johnson and A. Garrison, partners," etc.; "for that "they made their promissory note in writing," etc., but it is not averred that they executed the note as partners. Plea by Johnson that he and Garrison did not as partners execute the note.

*Held* an immaterial plea, the word "partners" being a mere description of defendants' persons. But it does not appear that this plea had anything to do with the decision of the case, and the judgment of the court below was affirmed.

At common law, under the declaration in this case, plaintiffs below would have been obliged to prove a joint contract by defendants, hence the allegation of a joint contract is sufficient. There can be no question that it was the intention of the Legislature to change the rule and dispense with the necessity of this proof, where the joint liability is not expressly denied.

## V.

It was proper for the witness White to refer to written memoranda to assist his memory, and his testimony as to the facts contained in such memoranda was properly admitted.

1 Greenl. Evid., § 436.

He testified (printed record p. 11), that he had a distinct recollection of the fact of the delivery, and referred to written memoranda "to assist him in testifying," which is the same as saying "to assist his memory."

The objection goes to the weight, rather than to the admissibility of the evidence.

## VI.

The court did not err in refusing to instruct the jury that there was no sufficient proof of the delivery of the iron at Mount Vernon.

It was proved that the iron was shipped at Baltimore, Md., by the Baltimore & Ohio Railroad, directed to "C. & J. Cooper & Co." a few days prior to the dates of delivery mentioned in White's deposition, and that bills of lading were mailed by plaintiffs below, to C. & J. Cooper & Co., Mount Vernon, Ohio, and never came back to plaintiffs. (Printed record p. 12.)

John W. White testified that the iron received by Baltimore & Ohio Railroad, marked "C. & J. Cooper & Co.," was delivered to C. & G. Cooper & Co., (defendants), soon after it was received at Mount Vernon. He further identifies the iron by the number of plates and their weights. (Printed record p. 11.)

The receipt of the iron was not denied by defendants below.

## VII.

There being no evidence that the sale was upon credit, no controversy as to the amount due, and no reason for delay in payment, there was an implied promise to pay for the goods on delivery, and the court properly instructed the jury to allow interest, as damages, from the date of the receipt by defendants below, of the iron forming the last item in the account.

*Mills v. Bank of United States*, 11 Wheat. 431.
*Waring v. Henry*, 30 Ala. 721.
*Shields v. Henry*, 31 Ala. 53.
*National Lancers v. Lovering*, 10 Foster (N. H.) 511.
*Close v. Fields*, 13 Texas 623.

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